IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPLICATION NO. 2285 OF 2007

Smt.Sayara Abdul Hussain Shaikh. ... Applicant.

V/s.

The State of Maharashtra. ... Respondent.

S.V.Kotwal with S.S.Bhandary for the applicant.

Ms.M.H.Mhatre, APP for the State.

CORAM: V.C.DAGA, J.

DATED: 7th August 2007.

P.C.:

. Heard learned counsel for the applicant and learned A.P.P. for the State.

2. By this application, filed under section 439 of Code of Criminal Procedure, 1973, the applicant is seeking bail in connection with C.R.No.310/2006 registered with Anti Narcotic Cell, C.B. C.I.D., Mumbai for the offences punishable under section 8(c) read with sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for short).

3. The factual matrix reveals that on 24th October, 2006, PSI Chavan received information that the applicant along with other three persons are likely to come near Anjanabai Nagar, near bus stop, Kurla (West) at about 12.00 noon for selling Gard powder to their customers. Accordingly, trap was arranged and present applicant along with three others were apprehended on the spot. On being searched, present applicant was found in possession of 280 grams of Gard powder and hence she came to be arrested on the spot.

4. That as per the report of Chemical Analyser, which is available on record, the result of the analysis is as under:

> Monoacetyl morphine and traces of heroin along with other opium alkaloids are detected--
>
> in exhibit nos.(1) to (4) --
>
> Exhibit nos.(1) to (4) contain 3.57%, 2.81%, 3.61% and 3.19% of monoacetyl morphine--
>
> Exhibit nos.(1) to (4) fall under section 2(xvi)e of NDPS Act 1985--

5. It is, thus, clear that 280 grams Gard powder was containing certain traces of heroin along with other opium alkaloids. The percentage of traces is not mentioned in the analysis report.

6. The learned counsel for the applicant relied upon the judgment of the Delhi High Court in the case of **Ansar Ahmed v. State (Govt. of NCT of Delhi)**, 2005 (4) Crimes 598 (Del.) to contend that quantity of neutral substance or substances is not to be taken in considering whether a small quantity or a commercial quantity of the narcotic or psychotropic substance is recovered. Only the actual content by weight of the narcotic drug of the psychotropic substance (as the case may be) is relevant for determining whether it would constitute "small quantity" or "commercial quantity". The Delhi High Court relied upon the judgment of the Apex Court in the case of **Ouseph v. State of Kerala,** (2004) 4 SCC 446; wherein the total quantity which was assessed was not taken into account but the prohibited contents therein were taken into consideration to reach to the conclusion as to whether the prohibited substance was having commercial or a small quantity. Relying on these two judgments, learned counsel for the applicant submits that section 27 of the NDPS Act would not be applicable. He further contends that the applicant is in jail since 24th October, 2006 i.e. more than six months.

7. Per contra, learned A.P.P., appearing for the State, strongly opposed for grant of bail. He relied upon the order of learned single Judge dated 22nd August, 2005 passed in Criminal Application No.4185/2005 to contend that entire substance is required to be taken into account for determination whether it is "commercial quantity" or "small quantity".

8. Without going to the rival contentions of the issue raised, at this stage, since the trial is pending and considering the weight of the submissions advanced by learned counsel for the applicant and the fact that the applicant is already behind bar for more than six months, I am inclined to grant bail in favour of the applicant subject to the following conditions:

(a) The applicant, arrested in connection with C.R.No.319/2006 registered with Anti Narcotic Cell, C.B. C.I.D., Mumbai shall be enlarged on bail in the sum of Rs.1,00,000/- with one or two local sureties to make up the said amount.

(b) The applicant shall report to the Anti

Narcotic Cell, C.B. C.I.D., Mumbai twice a week, i.e. on every Monday and Friday between 3.00 to 5.00 p.m. till conclusion of the trial.

(c) The order of bail will be given effect only after the applicant furnishes to the investigating officer the details about his place of residence and address where he proposes to stay after he is enlarged on bail. The applicant will not change his residential address thereafter till the conclusion of trial without prior intimation to the investigating officer.

(d) The applicant shall not directly or indirectly, make any inducement or threat or pressurise any prosecution witnesses and shall not in any manner tamper with the prosecution evidence.

(e) The applicant shall co-operate with the investigating agency for disposal of the case. It is needless to mention that breach of any of the conditions by the applicant

shall result in cancellation of bail.

(f) Any observation made in this order shall not be construed as finding or expression on merits of the case at the time of trial.

9. Application stands disposed of accordingly.

JUDGE